Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re	)	**CONSOLIDATED DOCKET NO.**
DISTRIBUTION OF CABLE	)	**14-CRB-0010-CD**
ROYALTY FUNDS	)	**(2010-13)**
	)	

CTV'S RESPONSE TO PROGRAM SUPPLIERS' MOTION FOR REHEARING

In accordance with the Judges' November 9, 2018, Order Allowing Responses to Motion for Rehearing ("Order"), the Commercial Television Claimants ("CTV") provide this Response to the Motion for Rehearing ("Motion") filed by Program Suppliers ("PS") in this proceeding on November 2, 2018. This Response will demonstrate that the arguments made by Program Suppliers with respect to all seven of the separate grounds it asserts fail to meet the applicable standard for rehearing. The Motion should be denied.

I. Legal Standard for Rehearing

PS correctly quotes the regulatory grounds for rehearing.[1] But it fails to quote the statutory limitation that rehearing may be granted "in *exceptional cases*."[2]

Indeed, the Judges have repeatedly and consistently emphasized that in considering rehearing motions they apply "a strict standard in order to dissuade repetitive arguments on issues that have already been fully considered by the [Judges]."[3] The Judges applied this same

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1 Motion at 3; *see* 37 CFR §353.

2 17 U.S.C. §803(c)(2)(A) (emphasis added).

3 *Order Granting in Part and Denying in Part Sirius XM's Motion for Rehearing and Denying Music Choice's Motion for Rehearing*, Docket No. 16-CRB-0001 SR/PSSR (2018-2022), at 2 (Apr. 18, 2018) ("*SDARS III Rehearing Order*"), *citing Order Denying Motions for Reh'g*, Docket No. 2005-1 CRB DTRA, at 1-2 (Apr. 16, 2007).

strict standard in denying PS's motion for rehearing following the issuance of the last cable royalty distribution determination, covering the 2004-2005 royalty years.[4] The Judges found in that case that PS's arguments in support of rehearing were "based on the same view of the evidence" that the Judges had already rejected and "amount[ed] to nothing more than a recapitulation of arguments" the Judges had already considered.[5] For similar reasons, the Judges should deny PS's Motion on all counts here.[6]

II. Program Suppliers' Putative Grounds for Rehearing

A. The Judge's Decision to Refer to the Crawford Regression Analysis as a Starting Point for Their Determinations

PS argues that the Judges' decision with respect to use of the Crawford regression analysis results was "clear error" because the Judges' determination in *Distribution of the 2004 and 2005 Cable Royalty Funds,* 75 Fed. Reg. 57063 (Sept. 17, 2010) ("*2004-2005 Decision*") used regression studies only to corroborate survey results, not as the starting point to determine shares.[7] But PS had already made precisely the same argument in its Proposed Findings of Fact and Conclusions of Law in this case.[8]

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4 *Order Denying Motions for Rehearing,* Docket No. 2007-3 CRB CD 2004-2005, at 2 (Jul. 19, 2010) ("*2004-05 Cable Rehearing Order*").

5 *Id.*

6 If the Judges were nonetheless to determine that rehearing was appropriate with respect to any of PS's arguments, CTV would intend to participate and to address the merits of PS's argument in any such rehearing process.

7 Motion at 4.

8 Proposed Findings of Fact and Conclusions of Law of Program Suppliers ("PS PFF" and "PS PCL"), Docket No. 14-CRB-0010-CD (2010-13), at PS PCL 39 (Apr. 5, 2018). The Judges' decision also directly stated their reasons for using a different starting point than had been used in prior decisions. *[PUBLIC] Initial Determination of Royalty Allocation*, Docket No. 14-CRB-0010-CD (2010-13), at 36-37, 78, 118 (Nov. 8, 2018) ("*Initial Determination*").

PS goes on to argue that the regression was based on combining metrics that have separately been disfavored in prior royalty determinations.[9] Again, it had already made the same arguments in the case prior to the Judge's determination.[10]

As with its other arguments, PS is free to raise this issue on appeal.[11] But PS's Motion, consisting of little more than a "rehash of the argument that the Judges considered in the Initial Determination," does not "present the type of exceptional case" that would meet the strict standard for rehearing.[12]

B. The Purported Non-Replicability of the Crawford Regression

PS argues that Drs. Erdem and Gray "testified that they were unable to independently replicate" Dr. Crawford's regression analysis, and that it was therefore legal error for the Judges to rely on that analysis.[13] PS actually affirmatively presented the results of Dr. Gray's "attempted replication" of Dr. Crawford's study in its Proposed Findings of Fact in this case.[14] PS could instead simply have argued that Dr. Crawford's study should be rejected because Dr.

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[9] Motion at 5.

[10] *See* PS PFF 292, PS PCL 38. *See also Initial Determination* at 18-19.

[11] Indeed, PS has previously argued on appeal – although unsuccessfully – that reliance in a prior determination on particular quantitative evidence establishes binding precedent that bars reliance on different quantitative evidence in a new case on a different record. *See Program Suppliers v. Librarian of Cong.,* 409 F.3d 395, 401-402 (D.C. Cir. 2005).

[12] *See Order Denying Motion for Rehearing,* Docket No. 2006-1 CRB DSTRA, at 6 (Jan. 8, 2008) ("*DSTRA Rehearing Order"*).

[13] Motion at 5-6.

[14] PS PFF 316. *Cf.* Program Suppliers' Responses to Proposed Findings of Fact and Proposed Conclusions of Law ("PS RPFF" and "PS RPCL"), Docket No. 14-CRB-0010-CD (2010-13), at PS RPFF 77 (Apr. 20, 2018).

Gray was unable to replicate it,[15] but having chosen not to do so, PS cannot now present that argument as a basis for rehearing.[16]

C. Evidentiary Support for Table 18 and Table 19

PS argues that the "Ranges of Reasonable Allocations" and "Basic Fund Allocations" presented, respectively, in Tables 18 and 19 of the Judges' Initial Determination are not adequately supported by record evidence.[17] In its proposed findings in the case, PS presented its own proposed allocation ranges, based on the evidence it preferred.[18] PS's disagreement with the ranges the Judges identified based in part on other evidence may be presented on appeal, but does not constitute the kind of "exceptional case" that would warrant rehearing.[19]

D. Failure to Adjust PS's Share Upward Based on the Horowitz Study

PS argues that the Judges were "compelled" to have made an upward adjustment in PS's award share because its own Horowitz cable operator survey results provided a higher PS share than the Crawford regression did, as was also the case for SDC.[20] PS argued during the case that the Horowitz Study results should be used to determine its share.[21] Again, while PS may present

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[15] In fact, Dr. Gray did not even attempt to replicate Dr. Crawford's analysis, instead making fundamental changes in its design and methodology for the purpose of running a different analysis that produced results closer to his "viewing" study results. *See* CTV PFF 54; Tr. 3738-3739 (Gray), Tr. 1422, 1424 (Crawford). *See also Initial Determination* at 34 & n.69, 36.

[16] *SDARS III Rehearing Order* at 2 ("A party may not use a motion for rehearing merely to effect a change of tactics, to present a new theory, or to introduce new evidence after the trial has concluded").

[17] Motion at 6-7.

[18] *See* PS PFF 335.

[19] *See DSTRA Rehearing Order* at 6.

[20] Motion at 7-8.

[21] PS PFF 355.

its complaint that the failure to make an upward adjustment in its own share was "arbitrary"[22] on appeal, it does not meet the "strict standard" necessary for rehearing.

E. Reallocation of the Horowitz "Other Sports" Category Responses

PS argues that the results of the Horowitz Survey should have been adjusted in a different way to reflect its supposed ownership of the "vast majority" of programs in its newly created "Other Sports" category.[23] In its Motion, PS cites its own Proposed Findings as support for this argument.[24] Again, such a "rehash" of arguments previously made cannot form a proper basis for rehearing.[25]

F. Rejection of Late-Filed New "Viewing" Analysis

PS argues that it suffered "manifest injustice" as a result of the Judges' rejection of its Third Errata on the eve of the hearing.[26] PS erroneously characterizes the Third Errata as a mere "correction" of previously filed evidence,[27] but the Judges excluded the filing because it also presented an entirely new analysis.[28] The Motion cites PS's own unsuccessful pleading in opposition to the motion to exclude the Third Errata,[29] and thus again constitutes a mere

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22 Motion at 7.

23 Motion at 8-9.

24 *See* Motion at 8 n.40.

25 *DSTRA Rehearing Order* at 6. *See also Initial Determination* at 66 & n.117 ("the Horowitz Survey did not and could not specify whether ['Other Sports'] programming should be categorized as Program Suppliers or CTV"), 74 ("Without evidence to support the assignment of all 'other sports' value to Program Suppliers, the category becomes even more problematic.").

26 Motion at 9-10.

27 *Id.*

28 *Initial Determination* at 85.

29 Motion at 9 n.44.

"repetitive argument" on an issue the Judges have already fully considered, which cannot justify a grant of rehearing.[30]

G. "Sports Migration" Evidence

Finally, PS argues that the Judges failed to consider its evidence purportedly showing a reduction in the amount of sports programming on distant signals.[31] As the Motion itself makes clear, PS addressed the issue extensively in its own proposed findings.[32] Such an argument may be raised on appeal, but is plainly a "mere recapitulation" of arguments already made to and considered by the Judges, and cannot support rehearing under the statutory "exceptional cases" limitation and the corresponding "strict standard" the Judges must apply.[33]

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30 *See SDARS III Rehearing Order* at 2.

31 Motion at 10.

32 Motion at 10 n. 48, citing PS PFF 286-291.

33 *See 2004-05 Cable Rehearing Order* at 2; *SDARS III Rehearing Order* at 2.

CONCLUSION

PS fails to meet the necessary standard for granting rehearing in this case. Its Motion should be denied.

Respectfully submitted,

COMMERCIAL TELEVISION CLAIMANTS
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Dated: November 19, 2018

Proof of Delivery

I hereby certify that on Monday, November 19, 2018 I provided a true and correct copy of the Response in Opposition on Program Suppliers' Request for Rehearing of the Initial Determination of Royalty Allocation to the following:

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